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Mandatory Maternity Leaves and the Equal Protection Clause

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MANDATORY MATERNITY LEAVES AND THE EQUAL PROTECTION CLAUSE

In 1971, Mrs. Jo Carol La Fleur and Mrs. Ann Elizabeth Nelson were each forced to discontinue their employment because of the Cleveland School Board regulation prohibiting teachers from working after the end of their third month of pregnancy.[1] Each teacher brought an action against the school board under the Civil Rights Act of 1871,[2] claiming that these maternity regulations unconstitution-

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[1] Mrs. La Fleur expected her baby in mid-July. Nevertheless, she was notified that her maternity leave, which she had never requested, would be effective "from March 12, 1971 to the end of the 1970-71 school year and to include the first semester of the 1971-72 school year." Mrs. La Fleur's repeated requests to be allowed to continue teaching beyond March 12 were denied. Brief for Appellant at 4-5, La Fleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972).

The details of the regulation applying to Mrs. La Fleur state:

> Any married teacher who becomes pregnant and who desires to return to the employ of the Board at a future date may be granted a maternity leave of absence without pay.
>
> APPLICATION A maternity leave of absence shall be effective not less than *five* (5) *months before the expected date* of the normal birth of the child. Application for such leave shall be forwarded to the Superintendent at least *two* (2) *weeks before the effective date of the leave of absence.* A leave of absence without pay shall be granted by the Superintendent for a period not to exceed *two* (2) *years.*
>
> REASSIGNMENT A teacher may return to service from maternity leaves not earlier than the *beginning of the* regular school semester which follows the child's age of *three* (3) *months.* In unusual circumstances, exceptions to this requirement may be made by the Superintendent with the approval of the Board. *Written* request for return to service from maternity leave must reach the Superintendent at least *six* (6) weeks prior to the beginning of the semester when the teacher expects to resume teaching and shall be accompanied by a doctor's certificate stating the health and physical condition of the teacher. The Superintendent may require an additional physical examination.
>
> When a teacher qualifies to return from maternity leave, she shall have priority in reassignment to a vacancy for which she is qualified under her certificate, but she will not have prior claim to the exact position she held before the leave of absence became effective.

Effective February 1, 1971, no maternity leaves were to be granted to teachers employed less than one continuous year. Instead, such teachers would be asked to resign. Mrs. Nelson, expecting her baby in August, was accordingly asked to resign as of five months before the expected delivery date, *i.e.*, March 26, 1971. *Id.* at 6-7.

For a discussion of maternity leave policies, see Comment, 45 TEMP. L.Q. 240 (1972).

[2] 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983 (1970)) which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

ally discriminated on the basis of sex.[3] The relief sought was an injunction against implementation of the regulation and reinstatement with back pay.[4] Coming before the district court in April of 1971, the two cases were tried together due to the identical nature of the issues presented.[5] The trial court held for the defendants, finding the regulation reasonable and non-discriminatory.[6] A year later, the appellate court found the regulation "clearly arbitrary and unreasonable in its overbreadth."[7]

In order to comprehend this difference in holdings, one must first understand traditional judicial treatment of the equal protection clause.[8] In bringing suit under this clause, the plaintiff must establish

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[3] The equal protection argument with regard to maternity leaves may be summarized as follows:

1. pregnancy is a condition unique to the female sex;
2. pregnancy is not unlike other medical conditions in regard to its effects on an individual's ability to work;
3. to single out pregnant teachers for different treatment than teachers with other medical conditions, therefore, is to discriminate on the basis of sex;
4. since this singling out of pregnant teachers from other teachers has no underlying rational basis, it amounts to a denial of equal protection under law.

See, e.g., Brief for the Women's Equity Action League as Amicus Curiae at 4; Brief for the American Civil Liberties Union as Amicus Curiae at 7; Brief for the National Educational Association as Amicus Curiae at 21-22. *See also* Schattman v. Texas Employment Comm'n, 330 F. Supp. 328, 329 (W.D. Tex. 1971):

> By virtue of female physiology, the Defendant's policy applies solely to women. Women are terminated not because of their unwillingness to continue work, their poor performance, or their need for personal medical safety, but because of a condition attendant to their sex.

[4] La Fleur v. Cleveland Bd. of Educ., 465 F.2d 1184, 1185 (6th Cir. 1972).

[5] La Fleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208, 1209 (N.D. Ohio 1971). Comment, 40 U. CINN. L. REV. 857 (1971).

[6] La Fleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208, 1214 (N.D. Ohio 1971).

[7] *See* La Fleur v. Cleveland Bd. of Educ., 465 F.2d 1184, 1188 (6th Cir. 1972).

[8] U.S. CONST. amend. XIV, § 1 states in part "No state shall deny to any person within its jurisdiction the equal protection of the laws." Enacted in post-Civil War America, the amendment as a whole was directed toward securing rights for the freedman. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872). *See also Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1066 (1969) [hereinafter cited as *Developments*].

The broad language of the amendment, however, was soon applied to groups other than the ex-slaves, such as California's oriental residents. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Soon Hing v. Crowley, 113 U.S. 703 (1884); Chy Lung v. Freeman, 92 U.S. 275 (1875). More recent cases extending protection to aliens include: Graham v. Richardson, 403 U.S. 365 (1971) (overturning Arizona's residency requirement for welfare recipients); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (overturning a California statute barring commercial fishing licenses to individuals ineligible for citizenship).

Not all groups have been successful in their litigation under the equal protection clause. *See, e.g.*, Krause, *Equal Protection for the Illegitimate*, 65 MICH.

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that he was denied equal protection under law by a party acting with state sanction.[9] Since the regulation challenged in the present case had been issued pursuant to state statute,[10] there was no contest regarding the question of "state action." The litigation focused, rather, on the reasonableness of the regulatory classification and on the issue of what standard to apply in testing the regulation's constitutionality.

The Cleveland Board of Education argued that the only applicable standard was the "reasonable basis test."[11] Under this test, a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[12] Furthermore:

> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
> 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
> 4. One who assails the classification in such a law must carry

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L. REV. 477 (1967); Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 [hereinafter cited as Brown, *Equal Rights*]. But *see also* Levy v. Louisiana, 391 U.S. 68 (1968), *on remand* 216 So.2d 818 (1968) (illegitimate children are "persons" within meaning of equal protection clause).

[9] U.S. CONST. amend. XIV, § 1 states: *"No state* shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added). The term, state, has been liberally construed by the courts. *See* Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (shopping center serving public function); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (state agency leasing to restaurant which practiced discrimination); Terry v. Adams, 345 U.S. 461 (1953) (Democratic association controlling election machinery); Shelley v. Kramer, 334 U.S. 1 (1948) (judicial enforcement of racially restrictive covenants); and Marsh v. Alabama, 326 U.S. 501 (1946) (company-run town).

That any action taken by a local board of education is "state action" has not been widely questioned. Alston v. School Board, 112 F.2d 992 (4th Cir. 1940), does explain the connecting principles, however. *See also* Dunham v. Pulsifer, 312 F. Supp. 411 (D.C. Vt. 1970).

[10] OHIO REV. CODE § 3313.20 (1972), cited in La Fleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208, 1211 (N.D. Ohio 1971).

[11] For detailed discussion of this test, *see* Brown, *Equal Rights, supra* note 8; *Developments, supra* note 8. *See also* Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Harlan dissenting).

[12] Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *See also* McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 806-10 (1968); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 109-10 (1949); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 67 (1911); Barbier v. Connolly, 113 U.S. 27, 31-32 (1885).

> the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.[13]

In short, the "reasonable basis test" calls for judicial deference to legislative and administrative judgment.

The alternate standard, in contrast, accords no presumption of constitutionality to a challenged rule. In effect, therefore, it places the burden on the defendant to justify differential treatment. This "strict scrutiny" or "compelling state interest test," however, has only been applied under the following limited circumstances: (1) where there is possible infringement of a "fundamental right" or (2) where the classification made is "suspect."[14]

As Justice Harlan once noted, this standard, although an exception, possesses a potential for swallowing the entire equal protection rule, since virtually every state action interferes with someone's "fundamental rights."[15] In practice, however, the fundamental rights aspect of the compelling state interest test has been of limited utility to plaintiffs, partly due to judicial reluctance to rely on it. Where alleged violations have involved voting rights,[16] criminal appeals,[17] or education,[18] the federal courts have frequently applied a strict standard of review, but this has not been so in cases concerning other rights.[19] Moreover, even where the strict standard has been applied, it is apparent that reliance on the due process clause instead would probably have resulted in similar holdings. Perhaps the greatest hindrance, however, is that the courts have been no more successful in articulating a formula to distinguish fundamental rights from other rights under the equal protection clause, than they had been under the due process clause.[20]

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[13] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911). *See also* McGowan v. Maryland, 366 U.S. 420, 425 (1961); Morey v. Doud, 354 U.S. 457, 463-64 (1957); Williams v. McNair, 316 F. Supp. 134, 136 (D.D.C. 1970).

[14] Shapiro v. Thompson, 394 U.S. 618, 658-61 (1969).

[15] *Id.* at 661.

[16] *See, e.g.*, Harper v. Virginia Bd. of Election, 383 U.S. 663, 665-67 (1966); Carrington v. Rash, 380 U.S. 89, 96 (1965).

[17] Douglas v. California, 372 U.S. 353, 355 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). *Cf.* Boddie v. Connecticut, 401 U.S. 371 (1971).

[18] Brown v. Bd. of Education., 347 U.S. 483, 493 (1954); Hobson v. Hansen, 269 F. Supp. 401, 493 (D.D.C. 1967).

[19] *See, e.g.*, Russo v. Shapiro, 309 F. Supp. 385, 392-93 (D.C. Conn. 1969) (denying that the compelling state interest test should be used in matters of welfare rights).

[20] It is likely that any right found fundamental under the due process clause would also be fundamental for purposes of the equal protection clause. (The reverse is not necessarily so.) The old "ordered liberty approach" to these rights is developed in Palko v. Connecticut, 302 U.S. 319 (1937). The theory of "selective incorporation" is expounded in Duncan v. Louisiana, 391 U.S. 145 (1968). For a summary of Supreme Court decisions in this area, see Frankfurter,

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Despite these many weaknesses of the fundamental rights approach, plaintiffs and five amici curiae[21] in *La Fleur* relied on it, asserting that the compelling state interest standard was required, due to interference with the teachers' rights to work[22] and raise a family.[23] Plaintiffs and amici curiae also argued that the compelling state interest standard was necessitated by the regulatory formulation of a "suspect" classification based on sex.[24]

To date, only the California Supreme Court has clearly labeled sex as a "suspect" criterion for differential treatment. In *Sail'er Inn, Inc. v. Kirby*,[25] this court applied the compelling state interest test

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Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment, 78 HARV. L. REV. 746 (1965).

[21] Amici curiae were: The American Civil Liberties Union (ACLU); International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW); The National Educational Association (NEA); The United States Equal Protection Opportunity Commission (EEOC); and The Women's Equity Action League (WEAL).

[22] *See* Brief for Appellant, *supra* note 1, at 13. Cases discussing the right to work include: Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); Wieman v. Updegraff, 344 U.S. 183 (1952); Truax v. Raich, 239 U.S. 33 (1915); Keenan v. Bd. of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970); Ratti v. Hindsdale Raceway, Inc., 249 A.2d 859 (N.H. 1969). *But see* Orr v. Trinter, 444 F.2d 128, 134 (6th Cir. 1971) (denying that there is a constitutional right to public employment.)

The trial court in *La Fleur* denied that the rights of the teachers were a fundamental concern, suggesting instead that the right of the students to an education was far more important. 326 F. Supp. 1208, 1213 (1971). The appellate court did not even consider whether the right to work was "fundamental," but cited instead Wieman v. Updegraff, 344 U.S. 183, 192 (1952), which stated:

> We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory. La Fleur v. Cleveland Bd. of Educ., 465 F.2d 1184, 1188 (6th Cir. 1972).

[23] Brief for Appellant, *supra* note 1, at 13. Cases discussing the right to marry and/or to raise a family include: Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[24] Brief for Appellant, *supra* note 1, at 15-17. On the issue of sex-based discrimination as "suspect," *see* Note, *Are Sex-Based Classifications Constitutionally Suspect?*, 66 Nw. U.L. REV. 480 (1971).

[25] 95 Cal. Rptr. 329, 339-41, 485 P.2d 529, 539-41 (1971). In justifying its use of the compelling state interest test, the court stated:

> Laws which disable women from full participation in the political, business and economic arenas are often characterized as "protective" and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. . . . We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment. *Id.* at 341, 485 P.2d at 541.

It should be noted that this is directly contradictory to the position taken by the United States Supreme Court regarding the same law in Goesaert v. Cleary, 335 U.S. 464 (1948).

See also Seidenberg v. McSorley's Old Ale House, Inc., 317 F. Supp. 593,

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to a statute prohibiting most women from tending bar, and found the statute in conflict with the equal protection clause. While the United States Supreme Court over the past decade has consistently held classifications based on race, alienage, or national origin to be "suspect,"[26] it has never so held with respect to classifications based on sex. In fact, until the recent decision in *Reed v. Reed*,[27] the Court had upheld every statute it examined which conferred different treatment according to sex.[28]

This double standard[29] in judicial construction of the equal protection clause may be traced to the philosophies prevalent in nineteenth-century America. In 1872, the Court reinforced the concept that a woman's place was in the home by upholding Illinois' refusal to permit women to practice law.[30] As the concurring opinion phrased it:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belong to the female sex evidently unfits it for many of the occupations of civil life. . . . The harmony, not to say identity, of interests and views which belong [*sic*] . . . to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. . . .[31]

From the nineteenth century until the present day, variations on

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605 (S.D.N.Y. 1970) which held a tavern's refusal of service to women to be a denial of equal protection. The court in this case did not apply the compelling state interest test; neither did it apply the *McGowan-Doud* reasonable basis test. Rather it applied the "new reasonable basis test." *See infra* note 41 for other cases taking this middle-of-the-road approach.

[26] The landmark case establishing classifications based on race as "suspect" was Brown v. Bd. of Educ., 347 U.S. 483 (1954). Loving v. Virginia, 388 U.S. 1 (1967), further expressed this principle.

Distinctions based on alienage or national ancestry were contested soon after the equal protection clause was enacted. *See* note 8 *supra*. The first case to clearly enunciate the principle that distinctions based on race were suspect, however, was Korematsu v. United States, 323 U.S. 214 (1944).

[27] 404 U.S. 71 (1971). Relying on the reasonable basis test, the Court overturned an Idaho statute expressing preference for males as administrators of estates. Despite appellants' request that the compelling state interest test be applied, the Court never considered this issue. *See* Comment, 25 VAND. L. REV. 412 (1972).

[28] Comment, 25 VAND. L. REV. 412, 415 (1972).

[29] Eastwood, *The Double Standards of Justice: Women's Rights Under the Constitution*, 5 VAL. U.L. REV. 281 (1970).

[30] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872). Note that this case was decided under the privileges and immunities clause of the fourteenth amendment.

[31] *Id.* at 141 (J. Bradley, concurring opinion). *See also In re* Lockwood, 154 U.S. 116 (1894).

this philosophy have continued to serve as justification for unequal treatment of the sexes. In its 1908 decision in *Muller v. Oregon*,[32] for example, the Court upheld a statute limiting the working hours of women, on the ground that the physical and moral protection of women was a legitimate end for legislation.[33]

Considered against the background of the horrid working conditions of the early twentieth century, this decision appears beneficent, for the Court was actually mandating discrimination *in favor* of women.[34] The underlying circumstances were forgotten in later years, though, and *Muller v. Oregon* came to stand for the simple proposition that classifications based on sex are valid unless shown to be clearly arbitrary. Indeed, later decisions not only neglected to consider the circumstances present in 1908 justifying the *Muller* decision, but actually cited that case in upholding statutes discriminating *against* women. One example is the 1948 decision in *Goesaert v. Cleary*,[35] in which the Court upheld a Michigan statute prohibiting women other than wives and daughters of bar owners from becoming barmaids. Undoubtedly aware of the criticism this holding would evoke, Justice Frankfurter remarked: "[T]he Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards."[36] Still bound by such sentiments more than a decade later, the Court dealt another blow to women's struggle for equality through its decision in *Hoyt v. Florida*,[37] upholding a statute which exempted from jury duty all women who did not volunteer.

Despite such continued judicial reluctance to recognize that females of the mid-century were a different breed than those of earlier decades, the President's Commission on the Status of Women took the position that women would achieve full equality via the fifth and fourteenth amendments in the near future.[38] Due to numerous

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[32] 208 U.S. 412 (1908). This case is discussed in L. KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 152-53 (1969); Kanowitz, *Constitutional Aspects of Sex-Based Discrimination in American Law*, 48 NEB. L. REV. 131, 135-36 (1968).

[33] Muller v. Oregon, 208 U.S. 412, 421-22 (1908). *Cf.* Lochner v. New York, 198 U.S. 45 (1905), in which a similar law applicable to bakery workers of both sexes was overturned on the grounds that it interfered with freedom of contract.

[34] Muller v. Oregon, 208 U.S. 412, 422-23 (1908). Referring to the female sex, the Court stated: ". . . legislation designed for her protection may be sustained. . . ." The Court spoke further of the design "to compensate [Woman] for some of the burdens which rest upon her."

[35] 335 U.S. 464 (1948).

[36] *Id.* at 466.

[37] 368 U.S. 57 (1961).

[38] *See* Brown, *Equal Rights*, *supra* note 8, at 877.

other new decisions perpetuating the ghost of *Muller v. Oregon*,[39] the outlook for success nevertheless remained poor. While racial classifications had been firmly established as "suspect,"[40] sex classifications continued to be permitted under the equal protection clause, as long as they rested on a "reasonable basis."

A subtle change in focus became apparent in the late sixties, however, when some courts claiming reliance on the old reasonable basis test overturned regulations according differential treatment on the grounds of sex.[41] In reality, these courts were applying a "new

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[39] Among the recent cases citing the *Muller* decision as good law is Johnson v. Cincinnati, 450 F.2d 796, 798 (6th Cir. 1971). Jones Metal Prod. Co. v. Walker, 267 N.E.2d 814, 822 (Ohio App. 1971), cited *Muller* as good law, but was reversed upon appeal on the ground that the Civil Rights Act of 1964 preempted the field of discriminatory employment practices by virtue of the supremacy clause of the United States Constitution. 281 N.E.2d 1, 7 (Ohio 1972). United States v. St. Clair, 291 F. Supp. 122, 125 (S.D.N.Y. 1968), while not citing Muller v. Oregon, does cite Goesaert v. Cleary in upholding the exemption of women from the armed forces—"[M]en must provide the first line of defense while women keep the home fires burning."

[40] *See* note 16 *supra.*

[41] Most of these actions arose under Title VII of the Civil Rights Act of 1964, (Act of Nov. 3, 1966, Pub. L. No. 88-352, Title VII, § 701) [codified at 42 U.S.C. § 2000e (1970)], and thus, have no direct bearing on judicial treatment of the equal protection clause in cases involving sex-based classifications. By the late sixties, however, perhaps due to stimulation from the Title VII decisions, several courts found discriminatory regulations regarding women to be unconstitutional under the equal protection clause. *See, e.g.*, United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968) (striking down a statute allowing longer sentences for women than for men guilty of the same offense). Note that while the court cites Muller v. Oregon as an example of permissible judicial deference, it refuses to defer to the legislature itself, and more rigidly scrutinizes the challenged statute than courts were willing to do under the old reasonable basis test. Kanowitz, *supra* note 31, at 171, states: "In sum, the *Robinson* decision reiterated the classic test, . . . but held that burden . . . was heavier on the state where the classification was of women as a group and resulted in a deprivation of personal liberty. . . ." *See contra, supra* note 5, at 865, which states that the court applied the compelling state interest test.

See also Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593, 605 (S.D.N.Y. 1970); White v. Crook, 251 F. Supp. 401 (N.D. Ala. 1966).

Reed v. Reed, 404 U.S. 71 (1971), may also be an example of this new approach to the traditional reasonable basis test. Reply Brief for EEOC as Amicus Curiae, La Fleur v. Cleveland Bd. of Educ., 465 F.2d 1184, 1188 (6th Cir. 1972), cites *Reed* as an example of this new approach which does not permit the kind of assumptions allowed under Goesaert v. Cleary, 335 U.S. 464 (1948), and Hoyt v. Florida, 368 U.S. 57 (1961).

In Cohen v. Chesterfield County School Bd., 326 F. Supp. 1159 (E.D. Va. 1971), *rev'd*, F.2d (4th Cir. 1973) decided only days after the appellate decision in the *La Fleur* case, a similar maternity regulation was struck down. Claiming to apply the "reasonable basis test," the lower court found that no facts existed to justify the regulation. It should be noted that in mid-January of 1973 the *Cohen* decision was reversed on appeal. Ultimately, therefore, the Supreme Court may have to determine which federal court of appeals correctly analyzed the constitutional issues raised by mandatory maternity leave policies. Here, as in the *La Fleur* appellate decision, the district court refused to indulge in any presumptions of constitutionality or defer to the decision of the school

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reasonable basis test." Traditionally, courts accorded challenged statutes a presumption of constitutionality which could be overturned only if the plaintiff established that the classification in question bore no reasonable relation to any of the possible legitimate purposes of the statute. Under the new version of this test, the court accords no presumption of constitutionality to a statute, but rather weighs the merits of the goals supported by the statutory classification against the gravity of the rights infringed upon by that classification. This results in recognition of the deprivation incurred by a statute, although without as much protection for personal rights frustrated through sex discrimination as would be provided under the compelling state interest test.

Returning to the question initially posed—what standard should be applied in evaluating the Cleveland school board's maternity leave policy?—we find three acceptable alternatives: the compelling state interest test; the traditional reasonable basis test; the "new reasonable basis test." Precedent overwhelmingly supports application of the traditional test, as does the Supreme Court decision in *Reed v. Reed*,[42] a sex discrimination case decided while the *La Fleur* appeal was pending. In *La Fleur*, the trial court applied that test and found the classification of teachers into "pregnant females" and "others" to be reasonable in light of the expressed purposes of protecting teachers and maintaining classroom continuity.[43] The holding was vacated upon appeal, however.[44]

To the extent the Sixth Circuit Court of Appeals based its decision on the fact-finding errors of the lower court, it *appeared* to be holding that even under the traditional test the regulation was unjustified. Specifically, this court found that a teacher's pregnancy would no more tend to disrupt classroom continuity and order than any other medical condition would.[45] Furthermore, teaching past the third month of pregnancy was unlikely to be harmful to either mother

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board. In effect, then, the court was abandoning the traditional reasonable basis standard in an effort to come to grips with the social and scientific realities of today. (Note the court's citation of Douglas v. California and Harper v. Virginia Bd. of Educ. as recent expressions of the equal protection standard.) The decisions in *Cohen* and *La Fleur* contrast sharply with earlier judicial willingness to recognize administrative efficiency as a valid basis for upholding mandatory maternity leave policies. *See, e.g.*, Amster v. Bd. of Educ., 55 Misc.2d 961, 286, N.Y.S.2d 687 (1967), in which the court upheld a regulation requiring female teachers to remain at home for six months after the birth of a child.

[42] *See* note 27 *supra*.

[43] 326 F. Supp. 1208, 1213-14 (N.D. Ohio 1971).

[44] La Fleur v. Cleveland Bd. of Educ., 465 F.2d 1184, 1188 (6th Cir. 1972).

[45] *Id.* at 1187.

or child.[46] In light of these facts, the pregnant teachers had been unjustly singled out for special treatment.[47]

The court did not conclude its opinion there, however, but continued with a brief discussion of sex-based classifications in general,[48] noting the recent trend of decisions[49] overturning them. At no point, however, did the court state that the applicable standard of review in matters of sex discrimination was the compelling state interest test.

In fact, the Sixth Circuit Court *never* clearly stated what standard it was adopting. Since the existing maternity regulation might ease administrative burdens (according to the Circuit Court,)[50] strict adherence to the *McGowan-Doud* standard, practiced by the court below and recommended by the appellate dissent,[51] would have necessitated affirmation of the trial court's holding. It is apparent, then, that the old reasonable basis test tends to perpetuate a status quo, sustaining regulations no longer relevant to the social conscience. In overturning the school board regulation, therefore, the Circuit Court moved away from the traditional equal protection standard, coming closer to the compelling state interest test without adopting it. Only time will tell whether the Sixth Circuit really espouses the "new reasonable basis test" or the compelling state interest test.[52] Nevertheless, whichever test the Sixth Circuit ultimately endorses, its decision in *La Fleur* will continue to stand as an extension of the coverage of the equal protection clause.

Limiting somewhat the significance of that decision, as the Sixth Circuit Court itself recognized, is the recent amendment extending coverage of Title VII of the Civil Rights Act of 1964[53] to states and

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[46] *Id.* at 1187.
[47] *Id.* at 1188.
[48] *Id.*
[49] *Id.*
[50] *Id.* at 1187.
[51] *Id.* at 1190, citing McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 809 (1969), which states:

> The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. . . . [C]lassifications will be set aside only if no grounds can be conceived to justify them.

[52] In light of its recent decision in Johnson v. Cincinnati, 450 F.2d 796, 798 (6th Cir. 1971), it is improbable that the Sixth Circuit Court of Appeals implied an endorsement of the compelling state interest test in its *La Fleur* decision.
[53] 42 U.S.C. § 2000e (1971). *See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971); Note, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671; Oldham, *Questions of Exclusions and Exceptions Under Title VII—"Sex-Plus" and the BFOQ*, 23 HAST. L.J. 55 (1971). *See also* KY. REV. STAT. ch. 344 (1971).

state agencies, and eliminating the exemption of individuals employed in "educational activities of non-religious educational institutions."[54] Title VII does not prohibit all employment distinctions based on sex, but rather requires that any which are made be backed by a compelling interest. Under this "bona fide occupational qualification" exception,[55] the burden of proof rests on the employer wishing a sex-based classification upheld.

In the spring of 1972, the Equal Employment Opportunity Commission[56] issued a revised set of guidelines more clearly and specifically indicating the permissible scope of sex-based discrimination by employers.[57] Therein, the Commission for the first time categorically stated that exclusions from employment due to pregnancy would constitute prima facie violations of Title VII and that disabilities due to pregnancy and childbirth should be treated on the same terms as any other temporary disability.[58]

While the authority of the EEOC guidelines and decisions is persuasive, it is not mandatory that the courts follow those rulings.[59] Title VII, however, is the law, and several courts have acknowledged federal intention to preempt the field of discriminatory employment

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[54] Pub. L. No. 92-261, 86 STAT. 103 (1972).

[55] 42 U.S.C. § 2000e-2(e) (1970). *See* Phillips v. Martin Marietta Corp., 411 F.2d 1 (5th Cir. 1969); Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Jurinko v. Edwin L. Wiegand Co., 331 F. Supp. 1184 (W.D. Pa. 1971); Ridinger v. Gen. Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1969); Cheatwood v. S. Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969); Richard v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Or. 1969).

[56] 42 U.S.C. § 2000e (1970) authorizes establishment of the Equal Employment Opportunity Commission, whose duties are mainly educational and promotional. The Commission can undertake studies, collaborate with state and local agencies, and attempt to conciliate labor disputes insofar as these actions will further the purposes of this act. *See also* 42 U.S.C. §§ 2000e-5 *et seq.* (1970).

For Presidential efforts at implementing equal employment goals, *see* Exec. Order No. 11,375, 3 Fed. Reg. 684 (1967), *amending* Exec. Order No. 11,246, 3 Fed. Reg. 339 (1965); Exec. Order No. 11,478, 3 C.F.R. 133 (1969).

For an overview of discriminatory practices throughout the country, *see* U.S. Department of Labor pamphlets: *Laws on Sex Discrimination in Employment* (1970); *UCLA Conference: Sex Discrimination in Employment Practice* (1969); and *Weightlifting Provisions for Women by State* (1969).

[57] Equal Employment Opportunity Commission—Guidelines on Discrimination Because of Sex, 37 Fed. Reg. 6835 (1972).

[58] *Id.* at 6838. Prior to establishing these guidelines, the EEOC had ruled on a number of employment controversies involving maternity rules. *See, e.g.*, EEOC Decision No. 71-308 (1970), CCH Employment Practices Guide (hereinafter EPG) ¶ 6170; Decision No. 70-495 (1970), EPG ¶ 6110; Decision, Case No. LA 68-4-538E (1969), EPG ¶ 6125; Decision No. 70-360 (1969), EPG ¶ 6084 (1969).

[59] 42 U.S.C. § 2000e-12(b) (1970). *See also* Grimm v. Westinghouse Elec. Corp., 300 F. Supp. 984, 989 (N.D. Cal. 1969); Hecks v. Crown Zellerbach Corp., 49 F.R.D. 184, 191 (E.D. La. 1968), *term.* in part and *reaff'd* in part, 321 F. Supp. 1241 (E.D. La. 1968); Int'l Chem. Workers Union v. Planters Mfg. Co., 259 F. Supp. 365, 366-67 (N.D. Miss. 1966).

practices.[60] Nevertheless, Kentucky's Attorney General takes the position:

> [U]ntil the Supreme Court of the United States rules otherwise, Kentucky statutes, which limit the number of hours [and] periods of work of women . . . serve a legitimate purpose and recognition of the biological and psychological differences between the sexes and do not conflict with or violate the Federal Civil Rights Act of 1964, and, in fact, fall within the exceptions of the act under "bona fide occupational qualifications."[61]

Although no court has yet overturned any Kentucky statute on the grounds of a violation of Title VII, the numerous decisions overturning similar statutes in other states, including ones within the Sixth Circuit, point to the untenable nature of the Attorney General's opinion. Whether under a 42 U.S.C. § 1983 or a 42 U.S.C. § 2000 action, Kentucky must soon face the fact that the day of equal opportunity for women has arrived, and school boards,[62] in particular, will have to recognize that teachers "in the family way" have a right to remain in the classroom.

ADDENDUM

By mid-December, it had become apparent that the *La Fleur* decision would be recognized in Kentucky. At that time, the Fayette County School Board announced its new maternity leave policy, based on the principle that the decision to continue teaching during pregnancy is one that should be made by the individual teacher in conjunction with her physician.

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[60] LaBlanc v. S. Tel. & Tel. Co., 333 F. Supp. 602 (E.D. La. 1971); Ridinger v. Gen. Motors Corp., 325 F. Supp. 1089, 1094 (S.D. Ohio 1971).

[61] 1969 KY. OP. ATT'Y GEN. 334.

[62] *See, e.g.*, Fayette County Board of Education Policy § 24 (amended effective 9/20/71), which states in part:

> Maternity leave must be requested in time to become effective at least four (4) months before the estimated date of confinement. Estimate time of confinement must be certified to the Division of Personnel Services by the attending physician.
>
> A teacher on maternity leave may return to active duty three (3) months after delivery upon the written recommendation of the attending physician, provided the date said teacher is eligible to return to duty is consistent with the opening of a new school term or at any time during a school term provided there is a vacancy for which said teacher is qualified.